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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

WESTEL SAMOA, INC.

For Broadband C Block Personal
Communications Systems Facilities

and

WESTEL, L.P.

For Broadband Block F Personal
Communications Systems Facilities

and

Anthony T. Easton

To: The Commission

) WT Docket No. 97-199

) File No. 00560-CW-L-96

) File Nos. 00129-CW-L-97

) 00862-CW-L-97

) 00863-CW-L-97

) 00864-CW-L-97

) 00865-CW-L-97

) 00866-CW-L-97

COMMENTS OF CLEARCOMM, L.P.

ClearComm, L.P. ("ClearComm"), formerly known as PCS 2000, by its attorneys and pursuant to Section 1.106 of the Commission Rules, hereby files its comments on the Order of Certification in the above-captioned proceeding.¹

On September 9, 1997, the Commission designated this proceeding for hearing and Anthony T. Easton was ordered to show cause why he should not be barred from holding an

¹ See Order, FCC 97M-172 (Administrative Law Judge Arthur I. Steinberg, rel. October 20, 1997) ("Certification Order").

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attributable interest in a Commission licensee.² In particular, in Issue 1 of the HDO, the Commission explained that it sought to “[d]etermine, based on Anthony T. Easton’s misrepresentations before and lack of candor exhibited towards the Commission, whether Mr. Easton should be barred from holding Commission authorizations and participating in future Commission auctions.”³ However on September 29, 1997, Mr. Easton, by his attorney, informed the proceeding’s Presiding Judge that he refused to appear.⁴ Claiming deficiencies in the Commission’s jurisdiction and a violation of due process, Mr. Easton instead filed a “Petition for Reconsideration” of the HDO with the Commission.⁵ Left with no alternative but to conclude that Mr. Easton had waived his hearing rights, the Presiding Judge terminated the hearing as to Issue 1 and certified this matter to the Commission.⁶

ClearComm is a limited partnership controlled by SuperTel Communications Corporation (“SuperTel”), its corporate general partner. ClearComm’s predecessor entity, PCS 2000, a

² *Id.* See *Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause*, FCC 97-322 (Sept. 9, 1997) (“HDO”).

³ *Id.* at ¶ 53.

⁴ See Letter to Presiding Judge Arthur I. Steinberg from attorney Russell D. Lukas, dated September 29, 1997.

⁵ See Anthony T. Easton’s Petition For Reconsideration, WT Docket No. 97-199 (filed Oct. 6, 1997) (“Petition”). ClearComm has its own doubts as to the procedural propriety of the Petition, but instead of burdening the record with duplicative submissions it will rely on the objections already raised by the Wireless Telecommunications Bureau. See Wireless Telecommunications Bureau’s Opposition to Petition for Reconsideration, WT Docket No. 97-199 at ¶ 3 (Oct. 16, 1997) (“Opposition”).

⁶ See *Westel Samoa, Inc.*, FCC 97M-172, at 2 (Oct. 20, 1997). This unusual pleading cycle initiated by Mr. Easton led to an “Opposition” from the Wireless Telecommunications Bureau, See Opposition *supra* note 5. Mr. Easton filed a “Reply” on October 24, 1997.

limited partnership formed for the purpose of applying for C Block PCS authorizations, was, prior to July 2, 1996 controlled by Unicom Corporation ("Unicom"), its corporate general partner. The alleged misconduct of agents of PCS 2000 during the C Block auction for the Norfolk, Virginia BTA – including Mr. Easton – was the subject of a Commission proceeding that resulted in the imposition of a notice of apparent liability in the amount of \$1 million against PCS 2000. The instant proceeding arises out of the same alleged misconduct, but in this context to review the character qualifications of Mr. Easton as a Commission licensee and potentially enforce penalties prescribed in the Commission's bidding rules. Since the facts of the HDO pertain directly to ClearComm, as the successor to PCS 2000, it filed a petition to intervene in the Westel hearing on November 13, 1997.⁷

ClearComm generally supports the arguments previously presented in the Opposition of the Wireless Telecommunications Bureau.⁸ ClearComm, however, seeks in these comments to further demonstrate that: (i) the Commission undeniably had jurisdiction in these proceedings to order Mr. Easton to show cause why he should not be barred from holding any Commission licenses or participating in any future Commission auctions; and (ii) Mr. Easton's claims that he

⁷ See Petition to Intervene of ClearComm, L.P., WT Docket 97-99 (filed Nov. 13, 1997). ClearComm's standing to present these comments is based on its status as an intervenor in that proceeding. Standing to submit these comments is conveyed by the explicit terms of the Commission's *ex parte* rules, see 47 C.F.R. § 1202(d), which confers party status on (ClearComm) until the petition is acted upon. In the alternative, ClearComm seeks, to the extent necessary, a waiver of any applicable Commission rule in order to permit the submission of these Comments.

⁸ See *supra* note 5.

was denied due process are spurious. Moreover, ClearComm respectfully requests that the Commission summarily dismiss or deny Mr. Easton's petition.⁹

I. THE COMMISSION HAS JURISDICTION OVER MR. EASTON IN THESE PROCEEDINGS

Mr. Easton's claim that the Commission lacks jurisdiction over him is wholly without merit. Jurisdiction exists for several reasons: (i) the plain language of the rules and Mr. Easton's designation on ClearComm's Form 175 short-form application make it clear that Mr. Easton was a "bidder" in the C Block auction and, therefore, subject to the prohibitions and potential penalties contained in 47 C.F.R. § 1.2109(d); and (ii) because the Commission previously defined the scope of Section 1.2109(d) to include company "principals," Mr. Easton, as a director and chief executive officer of Unicom, was subject to the rule's application and the associated jurisdiction of the Commission.

A. A Plain Reading of § 1.2109(d) and the Terms and Conditions of the Broadband PCS Block Auction Shows Mr. Easton is Within the Intended Scope of the Term "Bidders" and, Therefore, Subject to Commission Jurisdiction

Section 1.2109(d) of the Commission's rules states:

"Bidders who are found to have violated...the Commission's rules in connection with their participation in the competitive bidding...may be prohibited from participating in future auctions."¹⁰

⁹ See *PCS 2000, L.P., Notice of Apparent Liability for Forfeiture*, 12 FCC Rcd 1703 (1997) ("*PCS 2000 NAL*"). The factual predicate for this proceeding is the *PCS 2000 NAL*. See HDO at ¶ 1-3.

¹⁰ 47 C.F.R. § 1.2109(d).

It is undisputed that these rules – specifically created to remove unscrupulous parties from the auction process – were applicable to the bidding that occurred during the PCS C Block auction.¹¹

By his own account, Mr. Easton “supervised the preparation and submission of PCS 2000’s bid for Round 11 of the C Block PCS auction.”¹² Yet in his Reply, Mr. Easton claims that he is not subject to Commission jurisdiction under Section 1.2109(d) because he is not included in the term “bidders,” which, he argues, “refers to ‘auction winners’ or ‘winning bidder[s].’”¹³ Mr. Easton concludes that he is not liable for his alleged misconduct because “PCS 2000 was the winning bidder in this case, not Mr. Easton.”¹⁴ Mr. Easton’s reading of the rules flies in the face of their plain language and common sense.

Put simply, Section 1.2109(d) was designed by the Commission to prevent fraud in the auction system.¹⁵ In this regard, it seems beyond dispute that in the ordinary definition of the word, a bidder is “a person who bids,”¹⁶ and literally encompasses those who prepared bids and submitted them to the FCC. This is exactly what Mr. Easton did as one of three authorized

¹¹ See, New Procedures, Terms and Conditions for Broadband PCS C Block Auction, Scheduled for December 11, 1995, 60 FR 54353 (FCC Oct. 23, 1995) (Public Notice) (“C Block Rules”). The Commission’s auction rules were adopted pursuant to authority contained in Section 309(j) of the Communications Act, which was adopted by P.L. 103-465 on December 12, 1997. 108 Stat. 4809. This amendment specifically gave the Commission the authority to “by regulation, establish a competitive bidding methodology.” 47 U.S.C. § 309(j)(3).

¹² See Declaration of Anthony T. Easton (dated Jan. 26, 1997).

¹³ Reply, at ¶12.

¹⁴ *Id.*

¹⁵ See C Block Rules.

¹⁶ Webster’s Third New International Dictionary at 213 (1981).

bidding agents for PCS 2000.¹⁷ Therefore, giving the words of Section 1.2109(d) their plain and ordinary meaning, Mr. Easton is clearly within the ambit of the word "bidder" and, thus, is subject to Commission jurisdiction and sanction for his actions.

Even ignoring, however, the plain meaning of the term "bidder" as it is used in Section 1.2109, the Commission has made it quite clear that it intended the term to include more than simply potential licensee companies. In this regard, Mr. Easton is simply incorrect in his conclusion that the Commission has construed the term "bidder" so narrowly as to apply only to the persons or business associations that apply for Commission licenses through the competitive bidding process. Indeed, the Commission's rules refer to these entities primarily as "applicants."¹⁸ Moreover, one of the things that an "applicant" is required to do is to submit "[t]he identity of the person(s) authorized to make or withdraw a bid"¹⁹ – i.e., those who will literally engage in bidding on behalf of the applicants.

For their part, the Commission has specified that "only those individuals listed on the FCC Form 175 will be authorized to place or withdraw bids for the applicant during the auction."²⁰ This requirement served to identify a small group of individuals whom the Commission regarded as "bidders" for purposes of the PCS license auctions – that is, those people named on the applicants' FCC Form 175. As indicated above, Mr. Easton was so

¹⁷ The bidding agents, including Mr. Easton, were already identified on the face of PCS 2000's applications – as required by Commission rules.

¹⁸ *See, e.g.*, 47 C.F.R. § 1.2105.

¹⁹ 47 C.F.R. § 1.2105(a)(2)(iii).

²⁰ *C Block Rules*, at 54354-55; *See also*, 47 C.F.R. § 1.2105(a)(2)(iii).

designated on PCS 2000's Form 175. Additionally, in its rules and procedures, the Commission routinely refers to persons submitting the bids as "qualified bidders."²¹ Finally, in fact, by his own admission, Mr. Easton played a central role in the bidding process and literally submitted the bids in question. As such, he was a "bidder" under the rules and subject to the conditions set forth in Section 1.2109(d).

Any other reading of the Commission's rules would be inconsistent with their purpose to deal decisively with "misconduct, misrepresentation or bad faith in the auction process."²² In promulgating § 1.2109, the Commission specifically sought the power to "declare the applicant *and its principals* ineligible to bid in future auctions, and...take any other action that it may deem necessary..."²³ However, under Mr. Easton's narrow interpretation, a person who is designated as an "qualified bidder" and engages in "bidding" in a Commission auction may misrepresent facts to the agency, destroy relevant evidence, impede Commission investigators and violate innumerable other Commission rules and policies – all with complete impunity. Under Mr. Easton's view, it simply does not matter what he has done because the Commission is powerless to punish him. This is manifestly inconsistent with the Commission's stated purpose in enacting regulations to prevent such behavior.

²¹ See, e.g., C Block Rules, at 54357 ("Bidders will be able to place their bids electronically or by telephone").

²² Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 9 FCC Rcd 2348, 2383 (1994).

²³ *Id.* (emphasis added).

B. As a Former Principal in PCS 2000, Mr. Easton Is Subject to Commission Jurisdiction

Even if Mr. Easton were not deemed to be a "bidder," he was clearly a principal of the applicant at the time of the mistaken bid, and, as such is subject to Commission jurisdiction. The question of who is responsible for bidding improprieties in the auction context was examined by the Commission in *Commercial Realty St. Pete*,²⁴ where executives of an auction participant misled the Commission regarding the company's ability to pay for the licenses on which they had successfully bid. In that hearing designation order, the Commission explicitly concluded that company "principals" were among those who would be held accountable for bidding misconduct and, in fact, requested the presiding officer to determine whether the applicant's "principals should be banned from future auctions and from being Commission licensees."²⁵

In the present case, Mr. Easton was a director and the chief executive officer of Unicom and a bidding agent for PCS 2000. Consequently, he was a principal of the company and, under the clear precedent set in *Commercial Realty St. Pete*, subject to the FCC's jurisdiction regarding wrongdoing that occurred while he served in those capacities.²⁶

²⁴ *Commercial Realty St. Pete, Inc.*, 10 FCC Rcd 4313 (released Feb. 16, 1995).

²⁵ *Id.* at 4317-4318. Indeed, the Commission specifically determined that if it was found that Mr. Hartley (one of Commercial Realty's principals) "intentionally misrepresented facts" in his declarations or papers with the Commission, the agency would "refer any violations to the Department of Justice for possible criminal prosecution." *Id.* at 4318. *Commercial Realty* clearly shows that the Commission's jurisdiction cannot logically or fairly be limited to corporate licensees, as Mr. Easton would argue.

²⁶ Unlike this case, in *Commercial Realty* the licensee's conduct was inexorably tied to the conduct of principals who remained with the company.

C. As a Commission Licensee, Mr. Easton is Subject to the FCC's Jurisdiction

As the Bureau has demonstrated, Mr. Easton is also subject to the Commission's jurisdiction in these proceedings on the wholly independent grounds that he is a Commission licensee. Mr. Easton holds a Technician Plus Class operators license in the Amateur Radio Service and a license for station call sign WA3OYF.²⁷ As a licensee, his fitness to retain his license is subject to review at any time for any "willful or repeated failure to observe...any rule or regulation of the Commission...."²⁸ Before it may revoke a license for such violations of its rules, however, the Commission must first "serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued."²⁹ In the present case, Mr. Easton was served with such an order to show cause and is subject to Commission jurisdiction for review of his status as a licensee.

Contrary to Mr. Easton's claims, there is nothing in the rules or the Communications Act of 1934 ("Act") to prevent the Commission from including a review of his license in the present proceedings, or using it as an independent basis for jurisdiction.³⁰ Similarly, the rules do not support his contention that a "new proceeding"³¹ would be required if Mr. Easton's licenses are

²⁷ Opposition at ¶ 5.

²⁸ 47 U.S.C. § 312(a)(4).

²⁹ 47 U.S.C. § 312(c).

³⁰ The rules do not prevent review of Mr. Easton's license in these proceedings. *See* 47 C.F.R. § 1.91(a).

³¹ Reply at ¶11.

put into issue in the instant case.³² Finally, Mr. Easton offers no support for his assertion that the Commission is somehow barred from using this proceeding – by way of “clarification” or otherwise – to revoke Mr. Easton’s license. The Commission has jurisdiction in the present proceedings for the additional reason that Mr. Easton is status a Commission licensee.

II. MR. EASTON HAS NOT BEEN DENIED DUE PROCESS

Mr. Easton argues that he cannot be held liable in these proceedings for conclusions of fact reached in the *PCS 2000 NAL*. Yet the basis for this argument, that Mr. Easton was somehow denied due process during the PCS 2000 proceedings, is preposterous. In fact, Mr. Easton fully and independently participated in the proceedings leading up to the NAL, and the Commission was clearly justified in reaching the conclusions that it did with regard to Mr. Easton in that proceeding. As an initial matter, Mr. Easton must establish that government has deprived him of ‘liberty’ or ‘property’ interests implied by the due process Component of Equal Protection Clause of the Fifth Amendment.³³ After establishing that interest, those seeking relief must also demonstrate that they have been deprived of adequate notice or a chance to appear at a hearing appropriate to the nature of the case.³⁴ While Mr. Easton has never demonstrated the threshold finding that his interests were threatened by government action such that he could avail

³² See 47 C.F.R. § 1.91(b).

³³ See e.g. *Communications Satellite Corporation*, at 7111.

³⁴ *Id.*

himself of a due process claim,³⁵ [WHAT DOES THIS MEAN?] even assuming, arguendo, that such an interest existed, Mr. Easton was afforded “adequate notice and opportunity for hearing appropriate to the nature of the case.”³⁶

A. Mr. Easton Participated in the PCS 2000 NAL Investigation

In his Petition, Mr. Easton first claims he was “given *no opportunity* to adjudicate the issue of whether he acted intentionally or to otherwise challenge the outcome of the Commission’s investigation.”³⁷ In his Reply however, Mr. Easton says he “reasonably believed that he would be given a *better opportunity* to challenge the Commission’s ‘conclusion’ that he engaged in intentional misconduct.”³⁸ Regardless of the changing winds of Mr. Easton’s arguments, neither supports his claim that he was denied due process. Mr. Easton was an active participant in the proceedings that led to the *PCS 2000 NAL*; his personal preference for a “better” opportunity to explain the facts in a new proceeding is meaningless. While Mr. Easton may disagree with this outcome, this does not entitle him to repeated bites at the procedural apple.

By his own actions, it is clear that Mr. Easton was aware from the outset that the Commission was investigating the facts surrounding irregularities in PCS 2000’s Norfolk bid. Indeed, within days of the mistaken Norfolk bid, Mr. Easton submitted to the FCC a three-page

³⁵ Opposition, at ¶12.

³⁶ *Communications Satellite Corporation*, 3 FCC Rcd 7108, 7111 (1988).

³⁷ Petition, at 22-23 (emphasis added).

³⁸ Reply, at ¶8 (emphasis added).

declaration setting out his version of the events surrounding the error.³⁹ Mr. Easton clearly knew that his actions, and those of other PCS 2000 principals and employees, were being scrutinized by the Commission.

Perhaps the most astounding element of Mr. Easton's due process claim is that it disregards completely his own participation in the process leading up to the issuance of the *PCS 2000 NAL*. On numerous occasions during the various investigations, Mr. Easton submitted information to the Commission primarily through direct written submissions or in meetings with Commission personnel. Even a cursory search of records associated with the *PCS 2000 NAL* reveals: (1) a declaration from Mr. Easton regarding his role in the PCS bid, dated January 26, 1996;⁴⁰ (2) a letter from Mr. Easton indicating his desire to contribute to the investigation⁴¹ (3) an acknowledgment by Mr. Easton's counsel regarding the existence of a Commission investigation but which "declines" to set forth Mr. Easton's views at that time;⁴² (4) a second, follow-up declaration in June 1996, regarding the events of Round 11;⁴³ (5) the voluminous "Gutierrez Report,"⁴⁴ which not only detailed Mr. Easton's "testimony and cooperation" but attacked the

³⁹ See Declaration of Anthony Easton (dated January 26, 1996).

⁴⁰ *Id.*

⁴¹ See Letter from Anthony T. Easton to Mr. Fred H. Martinez, Esq. (dated February 14, 1997), submitted to the Commission as Exhibit I, in *Analysis of Abbreviated Investigation Into PCS 2000 C Block Overbid in Round 11* (Jan. 7, 1997) ("Gutierrez Report").

⁴² Letter from Lukas, McGowan to Mr. David M. Wilson (dated February 21, 1996) (attached as Exhibit J in the "Gutierrez Report").

⁴³ Declaration of Anthony T. Easton (dated June 26, 1996) (attached as Exhibit "E" to the "Gutierrez Report").

⁴⁴ See *supra* note 41.

credibility and testimony of witnesses who presented evidence against him⁴⁵ and even contained the testimony of a purported computer expert to try to shore up Mr. Easton's story.⁴⁶ The record also reveals that Mr. Easton had meetings with Commission personnel during the fall of 1996 during which he presumably gave his version of the facts.⁴⁷

In all, Mr. Easton has submitted more than 100 pages of evidence to the Commission. Not only did Mr. Easton participate in the investigation preceding the *PCS 2000 NAL*, but he did so on his own time, on his own terms, and with the guidance of counsel and special experts. It is assumed that his recently expressed desire for a "better" *process* is merely a winsome desire for an "better" *outcome*.

B. Failure to Offer a Section 309 Hearing to Mr. Easton Did Not Constitute a Denial of Due Process

Mr. Easton further claims that his due process rights were violated because the Commission failed to provide him with an evidentiary hearing prior to the issuance of the *PCS 2000 NAL*. However, under the clear strictures of Section 309 of the Communications Act⁴⁸ no such hearing regarding Mr. Easton was warranted or required.

The Commission is not required to initiate an evidentiary hearing before an administrative law judge every time a question of fact appears before it. Indeed, the

⁴⁵ Gutierrez Report, at 12-18. The Commission should note that Mr. Easton's investigative endeavors also included extensive background investigations of witnesses. *Id.*, at n. 12.

⁴⁶ See Declaration of Michael R. Gavette (dated December, 6, 1996) (attached as Exhibit S to the "Gutierrez Report").

⁴⁷ Opposition, at ¶11.

⁴⁸ 47 U.S.C. Section 309.

Communications Act requires the initiation of a hearing (for the purposes of this case) only where “substantial and material questions of fact” exist which would prevent the grant of an application before the Commission.⁴⁹ Stated another way, factual questions requiring a hearing must be material to the grant or denial of a particular application before the agency.

In this case, it is obvious that in the exercise of its broad discretion under Section 309, the FCC found that *Mr. Easton’s* guilt simply was not material to the grant of *ClearComm’s* applications. To the contrary, the Commission found that notwithstanding Mr. Easton’s actions, ClearComm’s applications were appropriate for grant.⁵⁰ For purposes of its Section 309 analysis of ClearComm’s applications, the Commission could even have assumed, without finding, that Mr. Easton had engaged in wrongdoing. In short, nothing in Section 309 required a hearing to

⁴⁹ 47 U.S.C. Section 309(e). Conversely, Section 309(d)(2) provides that if:

the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience, and necessity], it shall make the grant . . .

47 U.S.C. Section 309(d)(2).

⁵⁰ The Commission specifically noted that “misrepresentations [had been] made by Anthony T. Easton, a former Chief Executive Officer and Director of the applicant,” but that “[b]ecause PCS 2000 has removed all individuals who may have been responsible for the misrepresentations from its organization, we conclude that PCS 2000’s applications, as amended [by Mr. Easton’s removal], may be granted.” *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1682 (1997).

establish Mr. Easton's qualifications⁵¹ in order for the Commission to grant ClearComm's applications.⁵² That process had to do with *ClearComm's* qualifications not *Mr. Easton's*.

Mr. Easton's real argument appears to be that the Commission could not conclude its investigation and institute a notice of apparent liability proceeding against ClearComm without instituting an adjudicatory hearing with regard to Mr. Easton. However, Mr. Easton has cited nothing which prohibits the Commission from engaging in an investigation, reaching factual conclusions based on that investigation and taking appropriate forfeiture action towards a Commission licensee. And that is precisely what happened here. It may certainly be true that some additional process would be necessary in order for the Commission to take further actions based on the conclusions it reached in its investigation. But that is precisely what the FCC offered to Mr. Easton in its show cause order and precisely what Mr. Easton summarily rejected.

Having now foregone the opportunity for a hearing, Mr. Easton should not be heard to complain that he has been denied any due process rights. To the contrary, the Commission is now fully within its rights to take any action appropriate with regard to Mr. Easton's debarment from further participation in FCC auctions based on the factual conclusions reached in the *PCS 2000 NAL* and Mr. Easton's refusal to appear before the Presiding Officer.

⁵¹ Remarkably, if not surprisingly, Mr. Easton seeks to have it both ways. On the one hand, he argues that the Commission has no jurisdiction over him since he is not an applicant. On the other hand, he argues that the Commission was required to conduct a hearing under Section 309 – a section designed for hearings for applicants.

⁵² Likewise, the question of Mr. Breen's guilt or innocence presented no reason to delay the grant of ClearComm's license applications. Indeed, the Commission has found that questions of fact exist regarding Mr. Breen's actions, but those questions were simply immaterial to the grant of ClearComm's applications.

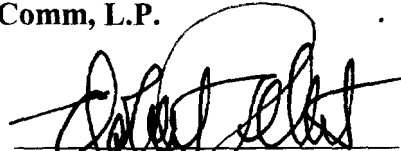
III. CONCLUSION

For the above stated reasons, ClearComm respectfully requests that the Commission summarily dismiss or deny Mr. Easton's Petition.

Respectfully submitted,

ClearComm, L.P.

By:



Robert L. Pettit

Richard H. Gordin

Bryan N. Tramont

David B. Silverman*

of

WILEY, REIN & FIELDING

1776 K Street, N.W.

Washington, D.C. 20006

(202) 429-7000

Its Attorneys

November 21, 1997

* Admitted in Illinois

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1997, I caused copies of the foregoing Clearcomm Comments on the Certification of "Issue 1" to the Commission to be mailed via first-class postage prepaid mail to the following:

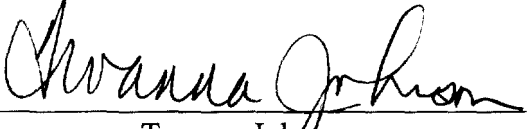
Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W.
Room 229
Washington, D.C. 20554

John Riffer, Esquire
Office of the General Counsel
Federal Communications Commission
Commission
1919 M Street, N.W.
Room 610
Washington, D.C. 20554

Russell D. Lukas, Esquire
Thomas Gutierrez
George E. Lyon, Jr.
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036

A. Thomas Corroccio, Esquire
Brian Cohen, Esquire
Ross Buntrock, Esquire
Bell, Boyd, & Lloyd
1615 L Street, N.W.
Washington, D.C. 20036

Joseph Weber, Esquire
Enforcement Division
Federal Communications
2025 M Street, N.W.
Room 8318
Washington, D.C. 20554


Twanna Johnson